



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 23 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Brian G. Svoboda, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 5879
Democratic Congressional Campaign Committee
and Brian L. Wolff, in his official capacity as
treasurer

Dear Mr. Svoboda:

On November 14, 2006, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and information provided by your clients, the Commission, on October 10, 2007, found that there is reason to believe the Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(a), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If your clients are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause

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conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Robert D. Lenhard
Chairman

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer **MUR: 5879**

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by counsel for J.D. Hayworth for Congress, see 2 U.S.C. § 437g(a)(1). Complainant alleges that the Democratic Congressional Campaign Committee ("DCCC") made an excessive in-kind contribution to Harry Mitchell for Congress ("Mitchell Committee"), which was Harry Mitchell's 2006 principal campaign committee for the U.S. House of Representatives for Arizona's Fifth Congressional District, in the amount of \$160,358.31 when it aired a television advertisement in support of, and featuring, federal candidate Harry Mitchell, and improperly reported the disbursement made in connection with the advertisement as an independent expenditure to the Commission. Complainant alleges that the DCCC's advertisement utilizes the same footage of Mitchell that the Mitchell Committee used in one of its own advertisements.

Because it appears that the Mitchell Committee produced the original footage that was used in the DCCC advertisement, the Commission finds reason to believe that the DCCC violated 2 U.S.C. §§ 434(b) and 441a(a) in connection with its republication of the video footage of the candidate.

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II. FACTUAL SUMMARY

On October 31, 2006, the DCCC aired a television advertisement that included footage of Arizona Congressional candidate Harry Mitchell. Mitchell appears in at least three frames of the advertisement, which references an endorsement Mitchell received from *The Arizona Republic*.

The next day, on November 1, 2006, the Mitchell Committee aired a television advertisement that appears to include the same footage of Mitchell that the DCCC used in the advertisement that aired 24 hours earlier, and also references the endorsement of Mitchell by *The Arizona Republic*. The overlapping content appears to consist of three screen shots that include identical footage of Mitchell, but display slightly different text on the screen.¹ See Complaint, Ex. 1

The complaint alleges that the DCCC disseminated a public communication that resulted in the DCCC's making of an excessive contribution to the Mitchell committee. To support the allegations, the complaint notes that the DCCC and the Mitchell Committee both used the same video footage in two separate television advertisements that aired within 24 hours of each other and that the candidate was featured prominently in several scenes in the advertisements.

Complaint at 2 and Ex. 1. A press report attached to the complaint indicates that a Mitchell Committee representative publicly acknowledged that "[the Mitchell Committee] shot the footage some time ago and placed it on an internet server, making it available to anyone."² Complaint, Ex. 2.

¹ The complaint attached screen shots of three frames from the DCCC and Mitchell Committee advertisements. These screen shots confirm that each used the same video footage featuring Harry Mitchell. Complaint, Ex. 1. The Mitchell campaign's television advertisement is still available on its website, along with another advertisement utilizing much of the same footage. See <http://harry2006.com/Videos.asp> (last visited August 13, 2007). However, the DCCC's television advertisement could not be located through publicly available sources.

² It is unclear whether this representative was referring to the raw footage of the candidate used in both advertisements, or the resulting advertisement produced by the Mitchell Committee.

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1 In its response to the complaint, the DCCC refers to the possible "visual or thematic
2 similarity" of the advertisements, but fails to discuss any details of the footage, including the
3 source of the footage. The DCCC denies that the advertisement was coordinated with the
4 Mitchell campaign and explains that the advertisement was produced through its independent
5 expenditure program, which worked behind a firewall that was intended to prevent "access to
6 information about candidate plans, projects, activities or needs." DCCC Response at 2. In an
7 affidavit attached to the DCCC response, the Chief Operating Officer of the DCCC explained
8 that during the 2006 election cycle, the DCCC adopted written procedures that it called the
9 "wall" that were "designed to ensure that nonpublic information about a campaign's plans,
10 projects, activities or needs would not be conveyed to those involved in preparing and
11 distributing the DCCC's independent expenditures." Habershaw Aff. ¶ 2. Those written
12 procedures were distributed to all staff and were also available for review by staff on the DCCC's
13 computer system. *Id.* ¶ 5. Under its firewall procedures, individuals assigned to the DCCC's
14 independent expenditure program were prohibited from having contact with campaigns and
15 agents of those campaigns "who would benefit from the independent expenditures" and from
16 discussing those campaigns with DCCC staff outside of the independent expenditure program.
17 *Id.* ¶ 3. The DCCC's firewall procedures also limited access to the DCCC's general files and
18 required vendors to comply with the procedures as well. *Id.* ¶ 4.

19 **III. ANALYSIS**

20 The Commission's regulations state that the republication of any broadcast or other form
21 of campaign materials prepared by the candidate's authorized committee shall be considered a
22 contribution for the purposes of contribution limitations and reporting responsibilities of the

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1 person making the expenditure. 11 C.F.R. § 109.23. Commission regulations also set forth a
2 number of uses of campaign materials that do not constitute a contribution to the candidate, such
3 as the dissemination of campaign materials done using a committee's coordinated party
4 expenditure authority.³ 11 C.F.R. § 109.23(b). However, such dissemination must not exceed
5 the coordinated party expenditure limits of the Federal Election Campaign Act of 1971, as
6 amended ("the Act"). 2 U.S.C. § 441a(d).

7 Based on the Mitchell Committee's public admission that it created the original campaign
8 footage the DCCC used in its advertisement and the similarity of the footage used in both
9 advertisements, it appears that the DCCC republished Mitchell's campaign materials, resulting in
10 an in-kind contribution to the Mitchell Committee unless the DCCC used its coordinated party
11 expenditure authority. 11 C.F.R. § 109.23. However, it does not appear that the DCCC used its
12 coordinated party expenditure authority because it claims it created the advertisement
13 independently. Given the cost of the advertisement (i.e., over \$196,000), the DCCC may have
14 made an excessive in-kind contribution of approximately \$190,000. Even if the DCCC did use
15 its coordinated party expenditure authority, it still would have made an excessive contribution
16 because the applicable coordinated party expenditure limit on behalf of the Mitchell Committee
17 was \$39,600. See 2 U.S.C. § 441a(a)(2)(A), 441a(d)(3)(B); *Price Index Increases for*

³ The exceptions include the following: 1) the campaign material is disseminated, distributed, or republished by the candidate or the candidate's authorized committee who prepared that material; 2) the campaign material is incorporated into a communication that advocates the defeat of the candidate that prepared that material; 3) the campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 C.F.R. § 100.73 or 11 C.F.R. § 100.132; 4) the campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own view; or 5) a national political party committee or a State or subordinated political party committee pays for such dissemination of campaign materials using coordinated party expenditure authority under 11 C.F.R. § 109.32.

1 *Coordinated Party Expenditure Limitations*, 71 Fed. Reg. 14218 (March 21, 2006).⁴ In
2 disseminating, distributing, or republishing Mitchell's campaign footage, the DCCC made an
3 excessive in-kind contribution to the Mitchell Committee and failed to properly report the
4 communication as a contribution in its reports to the Commission. Therefore, the Commission
5 finds reason to believe that the DCCC violated 2 U.S.C. § 441a(a) and 2 U.S.C. § 434(b).

⁴ The Act requires the Commission to adjust the coordinated party expenditure limits set forth in section 441a(d) annually to account for increases in the consumer price index. Political party committees have separate limits for each candidate. The applicable limits in effect for House candidates in 2006 were calculated by multiplying the base figure of \$10,000, set forth in section 441a(d), by the price index (3.961), yielding a limit of \$39,600 that a political party committee could spend on the general election campaign of a federal candidate for the House of Representatives. See 2 U.S.C. § 441a(c); *Price Index Increases for Coordinated Party Expenditure Limitations*, 71 Fed. Reg. 14218 (March 21, 2006).

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